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## Copyright Questions and Answers

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## Cases of Note from page 44

just happened to advertise in *LA Magazine*. And there was a shopping guide. *LA Magazine* did not seek Hoffman's consent to "shill" for hot designers. And if that wasn't enough, they replaced dumpy ol' Dustin's body with a buff male model's (!). *LA Magazine* argued that the Copyright Act preempted the state claims and the owner of the copyright of the *Tootsie* photo should be the party suing. For the federal Act to not preempt, the state cause of action must have something different in it from the equivalent of a copyright infringement claim. *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir.1987). Hoffman claimed the state right to protect his celebrity image. As his likeness and name is not a "work of authorship", then preemption does not apply. 17 U.S.C. 102.

### Rise and Stumble of a Hard-charging Ed

Michael Caruso was hired as ed-in-chief to "rev the magazine up to the volume of the city." 33 F.Supp.2d at 871. Of course he thought of celebrities. He did the clothes thing with Grammy-nominated singers, but he asked their permission. Likewise TV comedienesses. And they all posed in the clothes. But when it came to the actors, he chose to dodge paying the hefty sums he knew they would demand. So he hit upon digitizing. Caruso got the photos from photo archive companies, but simply ignored a variety of contract restrictions that would have prevented him from doing the digital alterations.

### Appropriation

Appropriation of another's name or likeness is an old Common Law variety of invasion of privacy. It doesn't even have to be a commercial advantage that is achieved. Just an advantage to the appropriator. *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342 (1983). California Civil Code Section 3344 is a right of publicity statute that provides a separate and distinct remedy from the Common Law.

Although why that makes any difference beats me because the statute reads: "Any person who knowingly uses another's name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling ... merchandise, goods or services without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof."

The Court found no First Amendment defense as the Constitution does not protect exploitative commercial use of someone's name and does not protect knowingly false speech. *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 425, 198 Cal.Rptr. 342 (1983). *LA Magazine* was not reporting the news. Hoffman had never worn the clothes they put him in, and it wasn't even his body. The "news

defense" is limited to using a likeness only to convey news. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

The Court found that Hoffman could have gotten \$1,500,000 Fair Market Value for selling his image. Which seems a tad piker-ish for that star of *Wag the Dog*. But the Court did say he was entitled to punitive damages to be determined later (*invasion of privacy is an intentional tort which allows punitives to deter similar acts in the future*). And they gave him attorney's fees. So there.

## Copyright - Registration Required for Suit

**Gerig v. Krause Publications, Inc.**, 33 F.Supp.2d 1304 (D. Ka. 1999).

This deals with that oddity of law wherein you can have copyright but can't sue without a certificate.

*Collector's Mart Magazine*, later **Krause Publications**, hired photographer **Gerig** to take shots, and used some but not all of them in the magazine. "Assignment fees" were paid for all of them. In November, 1997, Krause then published a book — *Decorating With Collectibles* — using photos previously published and some which hadn't been. **Gerig** claimed copyright in that latter bunch. **Gerig** had one registration certificate dated Dec. 2, 1997. He said the rest were pending and had canceled

checks as evidence.

*Are the dates bothering you? They're not significant. Either Gerig had or didn't have copyright in November, 1997. It doesn't matter that Krause got the book into print before his registration.*

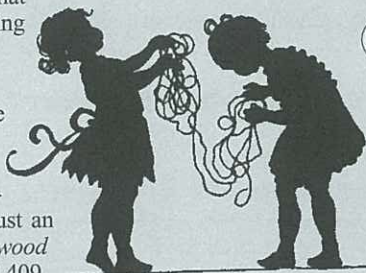
And of course you're bugged by the "assignment fees." Sounds like **Gerig** was an independent contractor (see **ATG** vol. 10 #6, pp.52-53) and held copyright. But what rights did **Krause** buy when they paid him a fee?

*None of that is explained in the case which is about when you can bring suit.*

You can't sue for infringement unless you've registered your copyright. 17 U.S.C. 411(a).

And here the case law splits. **Eleventh Circuit** and various district courts hold you need receipt of an actual registration certificate. *M.G.B. Homes v. Ameron Homes*, 903 F.2d 1486, 1488-89 (11th Cir.1990). **Fifth and Third Circuits** and another slew of district courts hold that initiating the process of registration is enough. *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384 (5th Cir.1984); *Sebastian Intern., Inc. v. Consumer Contact Ltd.*, 664 F.Supp. 909, 912 (D.N.J.1987), vacated on other grounds, 847 F.2d 1093 (3d Cir.1988).

Our Kansas court chose to go with the "plain language" of the statute and dismiss the case. Which means **Gerig** could continue his copyright application process and sue later. 🐿



## Questions and Answers — Copyright Column

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**QUESTION:** Does the suggestion of five for Interlibrary loan for ILL apply to periodical issues as well as copies? This library is a part of a three-library district, and each library counts ILL statistics separately. Libraries in the district also borrow magazine issues and make copies among the three. Should these transactions be counted as well?

**ANSWER:** The ILL guidelines apply to five articles from journals, not five issues of a journal. If your library borrows the original journal issue from a member of the consortium (district) then the ILL guidelines do not apply. They apply only when the lending library supplies a reproduction rather than the original item. If, however, a member of the consortium sends you a photocopy or other reproduction in response to an ILL request, then you count that as one article from that journal.

**QUESTION:** What is the wording that should be put on the photocopier to alert users about copyright?

**ANSWER:** Section 108(f)(1) requires that reproduction equipment contain a notice that making a copy may be subject to the copyright law. No particular wording is specified. There are three alternatives that are commonly used. (1) "Notice: Making a copy may be subject to the copyright law." (2) The Register of Copyright's warning that is required under section 108(d). or (3) "Notice: The copyright law of the United States (Title 17 U.S. Code) governs the making of photocopies or reproductions of copyright material; the person using this equipment is liable for any infringement." This latter statement is recommended in **ALA & NEA, The Copyright Primer for Librarians and Educators** 13 (1987).

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# From the Other Side of the Street — Viruses to Die For

by **Thomas Bacher** (Director, Purdue University Press, 1207 South Campus Courts, Building E, West Lafayette, IN 47907-1207; ph.: 765-494-8251; fax: 765-496-2442) <bacher@purdue.edu> <http://thorplus.lib.purdue.edu/thePress>

**W**oes about the World Wide Web abound. In one current of criticism or another, the Web has been seen as the primary cause of moral decay, the last step in the decline of civilization and even the precursor to the end of the world. Please say it ain't so Joe, or Tom or Dick or Harriet! Somehow, the wondrous utopian hope of the electronic revolution that was to link Lagos to Latvia in a great intellectual unification has languished, caught like a woolly mammoth in the Labrea tar pits. People in all walks of life noticed that even in cyberspace things didn't magically materialize—swoosh—unless someone worked very hard and another someone tossed in a few greenbacks, yen or marks.



Still, if nothing else, the Web has provided an open forum for any cause or cause celebre—nee Monica. Rumors run rampant

raging relentlessly round the cyberworld. Post, post haste, and don't postpone have become the calling card for the cyber-generation fixated on instant gratification, concentration spans of microseconds, and senseless Web sites. Along with the spread of what information has become, the evil side of Webbing it has increased as dramatically as computing power, making the creation and dissemination of viruses so rapid that by the time you've been warned, the damage is already done. My father used to lessen my fright as a child by telling me that if you see lightning strikes, they can't hit you. In today's cyber-universe, it's not the seeing that counts, but what attire you've donned to stop the pain. Oh King, your new anti-Norman virus shield is ready.

To combat the flow of bad viruses, I've gathered together an esteemed group of computer whizzes, six-year-olds who shall remain nameless, and asked them to develop some benign, in the eye of the user, viruses that have several beneficial effects. After hours of work, this young group of normal computer geniuses came up with the following list of strains. Quite remarkable in their breadth, these viruses are now available for distribution.

**The EECK (Exquisite Elsevier Crippling Knockout) Strain**—This virus attaches itself to Reed-Elsevier stockholders through tele-

pathic screen semiosis. The virus lies dormant for the greater part of its life and spawns only during the time that stockholders see the Reed-Elsevier annual report. The active virus invades a stockholder's central nervous system, blocks vision completely and sends subtle suggestions to the stockholder indicating that Reed-Elsevier's profits and journal prices are too high.

**The GEEK (Government Email Education Kopykat) Strain**—This virus searches the Internet and intercepts any email addressed to legislative representatives at the local, state or federal levels. Prior to routing the email to its destination, the following lines are inserted before the signature:

Vote for Tomorrow.

Fund Higher Education.

Support Libraries and University Presses.

Remember, we have the pictures!

**The MEEK (Monograph Escaped Electronic Kuckoo) Strain**—This bird of a virus infiltrates university and select commercial publishers' typesetting operations by residing in the boot sector of removable mass storage devices. On user activation of any page layout program, the virus copies files of book-length material and uploads these files to a secret site on the Net. This site has extremely high and thick firewalls and is only accessible to ACRL members. The virus gets its name because an image of a large cuckoo clock appears on the user's screen while the virus takes action. A bird pops out of the cuckoo as soon as the upload is complete and sings "So Long-it's Been Good To Know Yuh."

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## Copyright Questions & Answers from page 46

**QUESTION:** My library wants to digitize analog slide collections that are not otherwise available digitally such as art history slide collections, architecture or history of graphic design. What are the copyright implications?

**ANSWER:** Digitizing slides is basically a reproduction and very likely is infringement. To some extent, it may depend on the quality of the digitized slide. For example, if it is a thumbnail, low rather than a high resolution digitization, it may be less of a problem than if the digitized version is high resolution. Low resolution might be used in a catalog so that the user then retrieves the original slide. The problem with high resolution slides and wide availability is that they can then be used for further reproduction.

If a library digitizes the slides that a faculty member needs to use in a class for a semester, and the digitized slides are used simply to display to class, this may be fair use. It pushes the

boundaries certainly, but it may qualify under section 110(1), ignoring the fact that the copy was made. Clearly, a good argument can be made that this is the modern way to display slides in a classroom.

When the instructor then wants the digitized slides put on a Website for the duration of a semester, it is more problematic, but might still be fair use even though this is not covered by section 110(1). Also, the Website should be password protected so that the slides are not generally available on the Web but only to students in her class. Further, the slides should cease being available at the end of the class term.

**QUESTION:** My district is considering purchase of a system to deliver videos to the classroom which would involve transferring all of our videotapes to a digital file which could then be accessed through a server by multiple users. Is this a problem?

**ANSWER:** Yes, this is a fairly major problem. It is unlikely you would get approval from a single film copyright owner. There is no right

to reproduce films except under very narrow circumstances, such as under section 108(c) when the library copy is missing or damaged and the staff first tries to purchase an unused copy at a fair price. You might try approaching one film company and requesting permission.

**QUESTION:** At my church, the Sunday School teachers and youth director routinely rent (Blockbuster type) videos for various programs including baby-sitting type situations. What liability might a church or other non-profit entity consider in showing home videos? Is it similar to the liabilities for public school, private schools and daycare situations?

**ANSWER:** The exemption to the public performance right for the showing of videos is limited to nonprofit educational institutions. Churches are not schools (even though it is called "Sunday School"). Interesting question! This is a public performance under the Copyright Act and permission should be sought. It might well be granted with no royalties required. 